U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 May 2006

BALCA Case No.: 2005-INA-00029
ETA Case No.: P2002-CA-09535863/JS

In the Matter of:

NORDIX COMPUTER CORP.,
The Employer,

on behalf of

SAHAR A. IBRAHIM,
Alien

Certifying Officer: Martin Rios[1]
San Francisco, California

Appearance: James Canfield, Esquire
San Jose, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

Nordix Computer Corp (Employer) filed an application for labor certification[2] on behalf of Sahar A. Ibrahim (Alien) on April 6, 2001 (AF 63).[3] The Employer seeks to

[1] Mr. Rios was the Certifying Officer who denied the application. The Employment and Training Administration subsequently transferred responsibility over applications filed in San Francisco prior to the effective date of the "PERM" regulations to its Dallas Backlog Processing Center.

employ the Alien as an International Products Manager (Occ. Code: 13-1022). *Id.* This decision is based on the record upon which the Certifying Officer (CO) denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, the Employer described the duties of the position as "Prepare list of computer products required to meet specific needs of customers located in Arabic speaking countries including Egypt, Saudi Arabia, Kuwait, Jordan, and U.A.E. Locate and purchase computer components to meet those needs. Draft contracts, negotiate prices, and ensure adherence to customer requirements and contract obligations. Work with shipping department to meet import rules and regulations of country to which product is to be sent." The Employer required two years of experience in the job offered or two years of experience in the related occupation of products manager requiring application of import/export rules and regulations. (AF 63).

In the Notice of Findings (NOF), issued April 19, 2004, the CO discussed three deficiencies with the labor application. (AF 57-61). First, the CO observed the regulations require an Employer to document that the job offer is truly open to U.S. workers. 20 C.F.R. § 656.20(c)(8). The CO noted the Alien had the same surname as both the president of the U.S. company, Nordix Computer Corp., and the CEO of the Egyptian company, Egyptian Nordix Corporation. In addition, the CO stated that it appeared that the requirement for two years of experience as an international products manager was tailored to the background of the Alien since that is the title of the job which she held in a former position in Egypt. Because of those factors, the CO found

[2] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).

[3] In this decision, AF is an abbreviation for Appeal File.

that there was an appearance that the job offer was created for the labor certification process. The CO directed that the Employer, on rebuttal, should make a persuasive showing that the job opening for an International Products Manager is truly open to U.S. workers. The CO also directed the Employer to submit articles of incorporation, listing the names and titles of all corporate officers and the Alien's relationship to same. The CO also directed that the Employer show the Alien's relationship to all owners, officers, and partners, and the Alien's ownership interest in the firm. In addition, to determine whether the Alien was an employee, the CO directed the Employer to submit a copy of the last two W-2 forms for the Alien. Finally, the CO directed the Employer to show whether the job, "International Products Manager," existed prior to the labor certification application. The CO directed that if the position had been newly created, the Employer must show how this position would be different from the Account Manager position that the Alien had already held.

Second, the CO observed that requirements of the job are considered unduly restrictive when they are not normally required for the successful performance of the job in the U.S., citing 20 C.F.R. § 656.21(b)(2)(i)(A). The CO found that U.S. workers with educational training in business, such as a bachelor's degree or a master's of business degree, may be prepared for import/export careers. Thus, the CO concluded that the requirement of two years of experience in the job or as a products manager requiring application of import/export rules and regulations was unduly restrictive The CO directed that the Employer could delete the restrictive requirement and retest the labor market or justify the restrictive requirement on the basis of a "business necessity." To retest the labor market, the CO specified that the job offer should be amended to include either two years of experience, a bachelor's degree in business administration, or a combination of education and experience in import-export management. In the alternative, the Employer could justify the requirement by documenting that it is a result of business necessity.

Third, the CO noted that the advertisement lacked a heading which clarified that the job was for an import/export manager and that the description in the advertisement

failed to show any alternative to experience in the job title, Products Manager. The CO directed that on rebuttal the Employer must state a willingness to readvertise with the corrected description of the requirements as discussed above.

The Employer submitted rebuttal on May 20, 2004. (AF 35-56). The Employer stated, in answer to the first deficiency, that its president, Mr. Atef Ibrahim, wholly owns Nordix Computer Corporation and his brother, Mr. Khaled Ibrahim, wholly owns Nordix Egypt. The two companies are separate companies. The Employer explained that the name Ibrahim is written in English as Abraham and is a widely used name in the Middle East. The Employer stated that the Alien, Mrs. Sahar Ahmed Ibrahim, has no family relationship with Atef Ibrahim. The Employer submitted documents showing that Atef Ibrahim holds 100% ownership of Nordix Computer Corporation. In addition, the Employer stated that he has three International Sales/Product managers, one of whom is the Alien. The Employer submitted the Alien's W-2 forms for the last two years to document that she is an employee of the company.

In its rebuttal submission the Employer conceded that a more accurate title for the job position would be International Sales/Product Manager. The Employer agreed to delete the requirement in the related occupation section of the ETA 750A regarding the application of import/export rules. The Employer stated that the current other occupants of this job position had three and thirteen years of international sales experience when they were hired. The Employer agreed, however, that two years of experience dealing with international business would be acceptable, or, in the alterative, a minimum of a university degree with one year experience doing international sales/business. Since the Employer is a small company without the resources or personnel to train a person with no experience, the Employer stated that it is necessary for it to hire a qualified individual with the right set of experiences. The Employer agreed to title the advertisement as directed by the CO, but stated that the titled "import/export manager" does not correctly describe this position.

On June 14, 2004, the CO issued a Final Determination denying the Employer's application for labor certification. (AF 32-34). The CO found that the Employer's documentation regarding the Alien's relationship with the Employer was insufficient. The CO faulted the Employer for not providing information showing the names and titles of the officers or whether the Alien is related to any officer. Because of the missing information, the CO stated that his office was "unable to fully review the question of whether the job is truly open to U.S. workers." For this reason, the CO concluded that the rebuttal failed to show the job was truly open to US workers as required by 20 C.F.R. § 656.20(c)(8).

The CO also found that the Employer's assertion that a bachelor's degree alone would be an insufficient basis for hiring an individual for this position was unsubstantiated. The CO found that the Employer was not specific about how a previous attempt to hire a worker with a bachelor's degree was not successful, or how a combination of education and experience not in excess of the Employer's original two year requirement would not be acceptable. Therefore, the CO found that the Employer remained in violation of 20 C.F.R. § 656.21(b)(2)(i)(A). Based on the violations noted, the application was denied.

On July 15, 2004, the Employer requested BALCA review. (AF 1-31). Along with its request for review, the Employer submitted a letter with its articles of incorporation dated July 27, 1992, other stock documents dated 1993, 1998, and 2001, an IRS form 2552 dated September 15, 1992 showing Mr. Atef to be the sole shareholder in the Nordix Computer Corp., and birth certificates for Mr. Ibrahim, the Alien, Sahar Ibrahim, and the Alien's husband. In addition, the Employer submitted an assessment notice from the Employment Development Department, California, dated February 26, 2002 and a reply from the Employer dated April 8, 2002[4]. Finally, the Employer submitted a request for review from the Alien. The case was docketed by the Board on November 18, 2004.

[4] Evidence which should have been submitted on rebuttal is not properly before the Board and will not be considered. 20 C.F.R. § 656.24(b)(4); *Cathay Carpet Mills, Inc*., 1987-INA-161 (Dec. 7, 1988)(en banc); *Import S.H.K. Enterprises, Inc*., 1988-INA-52 (Feb. 21, 1989)(en banc).

DISCUSSION

An Employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to US workers. *Amger Corp.,* 1987-INA-545 (Oct. 15, 1987) (en banc). The CO found that the Employer did not provide clear evidence that a valid employment relationship exists between the Employer and the Alien with the rebuttal evidence submitted, including the Alien's W-2 forms, the Employer's tax forms which showed he owned 100% of the shares of the company, and the Employer's statement that there is no relationship between him and the Alien. The CO faulted such documentation for failing to show the names and titles of the officers of the corporation and whether the Alien is related to any officer.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the Employer must produce it. *Gencorp*, 1987-INA-659, (Jan. 13, 1988) (*en banc*). Here the Employer's president produced documents to substantiate his statement that he was the sole owner; however, he did not produce the specific document described by the CO in the NOF. The CO stated in the Final Determination that he was unable to fully review the question of whether the job is truly open to US workers since the Employer did not submit the articles of incorporation or document whether the Alien was related to any of the officers. We are not persuaded, however, that a review of the tax documents which clearly establish the Alien has no interest in the company, and the Alien's W-2 forms which clearly establish the Alien's employee relationship, are not sufficient to establish that the job offer is truly open to U.S. workers. Although the fact that the Alien and the Employer have the same surname was a reasonable basis for the CO to raise the issue of a *bona fide* job offer in the NOF, the evidence submitted, including the Employer's statement explaining that this surname is a common surname in Arabic countries, combined with the documentation which established the Employer's total ownership and the Alien's employee status, clearly addressed this issue. Since the tax forms clearly indicated that the Employer is the sole

owner of the company, there is no evidence to show the Alien has an interest in the company or undue influence in any hiring decision. Therefore, we find that the deficiency raised regarding the issue of whether the job is truly open to U.S. workers was adequately addressed by the Employer on rebuttal. Accordingly, the application for labor certification shall not be denied on this issue.

The CO noted a second deficiency, however, related to the Employer's requirements for the job opportunity. The regulations provide at 20 C.F.R. § 656.21(b)(2)(i) that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the Dictionary of Occupational Titles (DOT) and are normally required for a job in the U.S. *Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989) (en banc). If the job opportunity's requirements are beyond those normally required for the job in the United States or are beyond those defined for the job in the DOT, they are considered unduly restrictive unless the employer adequately documents the requirements as arising from business necessity. To establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc*., 1988-INA-82 (Feb. 9, 1989) (en banc).

The CO denied this application on the ground that the Employer's proposed amendment of the experience requirements to add an alternative requirement of a bachelor's degree with one year of experience was in excess of the initial requirement of two years of experience. The CO stated that the Employer president's assertion that his company is small and, therefore, he required employees with experience was not substantiated.

We note some confusion, however, on the particular requirements for this job opportunity. The CO identified the job opportunity as "Wholesale and Retail Buyers,

Except Farm Products" with an occupational code of 13-1022. The SVP (Specific Vocational Preparation) range for this category is listed as between 6 and 7. Category 6 requires over one year up to and including two years of experience while category 7 requires over two years up to and including four years. The CO correctly noted that for purposes of the DOT, four years of college is considered the equivalent of two years of experience. *Garland Community Hospital*, 1989-INA-217 (June 20, 1991). Therefore, the Employer's requirement of two years of experience in the job offered or a bachelor's degree and one year of experience does result in the combined education and experience requirement equaling three years. However, the Occupational Code used in this labor application is from the O*Net, which has replaced the DOT.[5] As noted above, the O*Net definition for this job category includes an SVP range from Category 6 to 7. If Category 7 is the appropriate SVP for this job opportunity then the Employer's alternative experience and education requirement would be within those normal for the occupation. Since the record does not clarify this confusion over the SVP for this particular job opportunity, and since the category 7 parameters would include the alternative education and experience requirement suggested by the Employer on rebuttal for use in re-testing the labor market, it is appropriate to remand this matter to the CO for further investigation and clarification regarding the SVP for this particular job opportunity.

In summary, the Employer has documented that the job opportunity is truly open to U.S. workers as required by 20 C.F.R. § 656.20(c)(8), however, this matter is remanded for further findings on the appropriate SVP for this job opportunity and to determine whether or not the Employer's alternative education and experience requirements are normal for the occupation and included in the DOT, or are unduly restrictive job requirements pursuant to section 656.21(b)(2).

[5] Although the O*Net has replaced the DOT, the pre-PERM labor certification regulations reference the DOT in regard to determining whether a job requirement is unduly restrictive.

ORDER

For the reasons stated above, the Certifying Officer's denial of labor certification is hereby **VACATED** and this case is hereby **REMANDED** to the CO for actions consistent with this Decision.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.